

“Waters of the United States” and the Clean Water Rule

February 9, 2017

Overview of Presentation

- **Waters of the US in broad context**

- CWA
- Section 404
- Longstanding regulations
- Legal challenges

- **The Clean Water Rule**

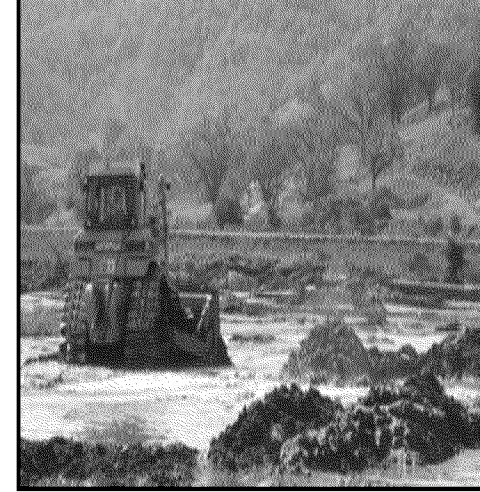
- Scientific basis
- Rulemaking process
- Content of CWR
- Ongoing legal challenges

“Waters of the US” and the Clean Water Act



- “Waters of the US” (WUS) is a threshold term under the Clean Water Act (CWA)
- All CWA programs address “navigable waters,” defined in the statute as “waters of the United States including the territorial seas”
 - CWA did not define WUS; Congress left to agencies
- EPA and the Army Corps have defined WUS by regulation since the 1970s. The regulatory definition in place before the CWR dates to the mid 1980s
- Two U.S. Supreme Court decisions since that 1980s regulatory definition did not invalidate the definition, but shaped its implementation

WUS and Section 404



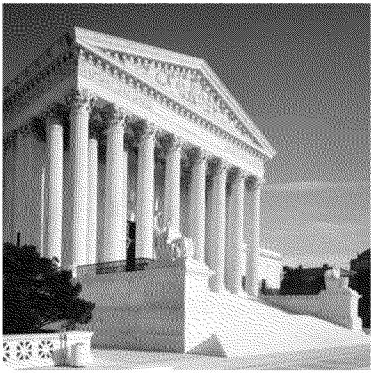
- Same definition of WUS applies to section 404 and other CWA programs
- Section 404 addresses the discharge of dredged or fill material into WUS
- Since 1972 the Army Corps and EPA have jointly implemented the program to significantly reduce the ongoing loss of wetlands and streams, while authorizing tens of thousands of dredged/fill activities annually
 - Congress tasked the Army Corps with operating the 404 permit program and EPA with developing the environmental review criteria under which permits would be evaluated
 - EPA and the Army Corps have jointly developed the definition of WUS, while EPA has the final policy responsibility for its scope

WUS and Section 404, continued

- The Army Corps makes the vast majority of jurisdictional determinations (JDs)
 - This is in part why WUS issues so often arise in the section 404 context
 - However, court decisions about the scope of WUS also have involved the section 402 NPDES and section 311 oil spill clean-up programs
- Even if dredge/fill discharges are into a WUS, a 404 permit might not be required if activity is excluded under 404(f)
 - For example, discharges associated with ongoing farming activities such as plowing, seeding, and cultivation typically do not need a 404 permit.

WUS and its Longstanding Regulatory Definition (dates to mid-1980s)

- This is the **definition in use today** during ongoing litigation over the Clean Water Rule
- **Many, but not all, waters are considered to be WUS:**
 - Waters used/historically used/susceptible to use in interstate commerce
 - Interstate waters and wetlands
 - All other waters ... the use, degradation, or destruction of which could affect interstate commerce
 - Impoundments of WUS
 - Tributaries of above waters
 - Territorial seas
 - Wetlands adjacent to above waters
 - Excludes: prior converted cropland, waste treatment systems



WUS at the Supreme Court

- ***Riverside Bayview*** (1985): Adjacent wetlands are properly part of WUS
- ***SWANCC*** (2001): Presence of migratory birds by itself not enough to make Isolated waters WUS
- ***Rapanos*** (2006): Tributaries, adjacent wetlands. Split decision on what WUS includes
 - Scalia: “Relatively permanent” or at least seasonal waters; wetlands with a “continuous surface connection”
 - Kennedy: Waters with a “significant nexus” affecting physical, chemical, or biological integrity of downstream waters
 - All: WUS includes more than just waters that are navigable

WUS and Legal Challenges Posed By *Rapanos*

- *Rapanos* has now been interpreted, applied, discussed, or cited in > 130 federal judicial opinion
 - These cases arise in more than 2/3 of all U.S. states
 - U.S. position: water jurisdictional if meets either the Kennedy or Scalia standards
- U.S. Circuit Courts of Appeal are split regarding what standard
 - Most hold either Kennedy or Scalia standard can be used
 - One held Kennedy standard only
 - None say Scalia standard only
- Supreme Court has rejected all petitions for review



Why Did the Agencies Develop the Clean Water Rule (CWR)?

- The Supreme Court did not invalidate the 1980s definition of WUS, but discussed its limitations and implications
- Permitting slowed as agencies implemented the unchanged definition in light of the Supreme Court decisions
- For more than a decade, EPA and the Army Corps received requests for rulemaking to provide clarity
 - Bipartisan Members of Congress, state and local officials, industry, agriculture, environmental and conservation groups, scientists, builders and developers, and the public

Why Did the Agencies Develop the CWR?

- The agencies wished to clarify protection for streams and wetlands that form the foundation of our nation's water resources.
 - **People depend on clean water for their health:** About 117 million Americans get drinking water from streams that were vulnerable to pollution after *Rapanos*
 - **Our economy depends on clean water:** manufacturing, farming, tourism, recreation, energy production and other major economic sectors need clean water to function and flourish
 - **Our cherished way of life depends on clean water:** healthy ecosystems provide wildlife habitat and places to fish, paddle, and swim

CWR: Scientific Basis

- The agencies' interpretation of the CWA's scope in the rule is guided by the **best available peer-reviewed science**— particularly as that science informs the determinations as to which waters have a “significant nexus” with traditional navigable waters (TNWs), interstate waters, or the territorial seas
 - Includes the Science Report summarizing **more than 1,200** peer-reviewed, published scientific studies which showed that small streams and wetlands cumulatively play an important role in the health of larger downstream waterways like rivers and lakes
- The **Technical Support Document** utilizes the Science Report and the articles it cites, as well as additional scientific literature to provide the scientific support for the rule
- The **Science Advisory Board** commented on both the Science Report and the proposed rule, concluding that much of the proposed rule was supported by available science and that the agencies could have protected yet more waters

CWR: Scientific Basis - SAB Conclusions

- SAB concluded that science **supports the conclusion** that the types of water bodies identified as “waters of the United States” in the proposed rule exert strong influence on the chemical, physical, and biological integrity of downstream waters
- Though SAB was supportive of much of the rule, some of their comments **suggested that the proposed rule could go further** in terms of waters that could be considered tributaries and went too far regarding exclusions
 - Advised EPA to reconsider the definition of tributaries because not all tributaries have ordinary high water marks
 - Exclusions of groundwater and certain other exclusions listed in the proposed rule and the current regulation do not have scientific justification
 - There is a lack of scientific knowledge to determine whether ditches should be categorically excluded

CWR: Process

- Proposed rule subject to public comment May 2014
 - Received 1.1 million comments, about 20,000 unique, in a 207-day comment period
 - Over 400 stakeholder meetings
 - Interagency review
- Final rule published June 29, 2015
 - Final ORD science synthesis provided much of the technical basis for the rule
- Sixth Circuit stayed the CWR nationwide pending outcome of litigation
 - Agencies using the mid-1980s definition during the stay

CWR: Process

- **Economic analysis** concluded CWR results in indirect net benefits, informed by comments on proposed rule and other data.
- Agencies held two in-person meetings with **small entity** representatives to discuss their thoughts on how to define WUS. Their input is reflected in the CWR and summarized in a report
- Agencies consulted with **state, tribal, and local officials** throughout the process. The CWR reflects their input, which also is summarized in a report
- For example, held in-person meetings and teleconferences with organizations of elected state/tribal/local officials, following up with numerous additional calls and meetings
- Held a series of meetings with the Local Government Advisory Committee

CWR: Content

- Bright line: Waters that are WUS

- Verbatim from 1980s rule: Traditional navigable waters, territorial seas, interstate waters, impoundments of WUS
- Tributaries, adjacent waters: in 1980s rule but with further definitions
 - Tributary: For first time, CWR defines “tributary” as water with “bed and banks” and an “ordinary high water mark” that contribute flow to a traditional navigable water, interstate water, or territorial sea
 - Adjacent: Existing regulations define “adjacent” as “bordering, contiguous, or neighboring.” CWR defines and limits “neighboring” for the first time using floodplain and distance concepts. CWR applies adjacency to all waters, not just wetlands, thereby clarifying status of ponds and lakes adjacent to jurisdictional water.
 - Agriculture: CWR adds that the agencies will not consider waters “adjacent” that are being used for normal farming, ranching, or forestry activities

- Case-by-Case

- Waters within certain distances, on a floodplain, or similarly situated, need a significant nexus to be jurisdictional

CWR: Content

- **Bright line: waters that are not WUS**
 - Existing exclusions for prior converted cropland, waste treatment systems
 - New exclusions reflecting public input, such as stormwater management and water recycling systems built in uplands
 - Exclusions for certain ditches, newly added to the regulations
 - Ditches not constructed in streams and that flow only when it rains
 - Ditches not constructed in streams and that have intermittent flow, that do not drain wetlands
 - Ditches not connected to the tributary system
 - Exclusions reflecting longstanding practice, newly added to the regulations, such as irrigated areas that would revert to dry land if irrigation ceased, and farm ponds and other artificial lakes or ponds

Additional information on CWR in Appendix

DRAFT, DELIBERATIVE

CWR: Content - Agriculture



- The CWR specifically recognizes the vital role that U.S. agriculture serves in providing food, fuel, and fiber at home and around the world
- The rule does not create any new permitting requirements for America's farmers
- Activities such as planting, harvesting, and moving livestock have long been exempt from section 404 regulation, and the CWR preserves those exemptions.

The CWR Does Not Change Agriculture Permitting Exemptions

Normal farming, silviculture, and ranching practices.

Upland soil & water conservation practices.

Agricultural stormwater discharges.

Return flows from irrigated agriculture.

Construction/maintenance of farm or stock ponds or irrigation ditches on dry land.

Maintenance of drainage ditches.

Construction or maintenance of farm, forest, and temporary mining roads.



CWR: Ongoing Litigation

- The CWR is being challenged in the Sixth Circuit Court of Appeals and in district courts
- Issue of “which court” currently is before the Supreme Court
 - Briefing process before the Sixth Circuit is stayed pending the Supreme Court’s decision, expected before July 2017
- The Sixth Circuit issued a temporary stay in October 2015
 - As a result, agencies are implementing the mid-1980s regulatory definition as litigation proceeds



Questions and Discussion

